STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	UNPUBLISHED June 8, 2001
v	No. 229111 Bay Circuit Court
MARK DREW PERKINS, Defendant-Appellee.	LC No. 00-001112-FH

Before: Holbrook, Jr., P.J., and McDonald and Saad, JJ.

PER CURIAM.

Plaintiff appeals of right from an order of the circuit court, quashing the bindover of defendant for misconduct in office, MCL 750.505, possession of firearm during the commission of a felony (felony-firearm), MCL 750.227b, and denying the prosecutor's motion to amend to include a count of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(f), and a related charge of felony-firearm. Earlier, at the conclusion of the preliminary examination, the district court had dismissed charges of CSC I and a related charge of felony-firearm. We affirm in part and reverse in part.

This case involves a deputy sheriff who befriended complainant when she was twelve years old. Thereafter, complainant began spending more and more time with defendant and his family. Complainant testified that she soon began to think of defendant "as the father that I never had . . . in my life." While complainant was still aged twelve, the two began a sexual relationship that lasted until she was age eighteen. The charges relate to an incident that took place just before the complainant's seventeenth birthday.

"A magistrate's ruling that alleged conduct falls within the scope of a criminal statute is a question of law reviewed for error, and a decision to bind over a defendant is reviewed for abuse of discretion." *People v Orzame*, 224 Mich App 551, 557; 570 NW2d 118 (1997). A circuit court reviews a district court's decision on whether to bind over a defendant for an abuse of discretion. *Id.* "[A] circuit court must consider the entire record of the preliminary examination, and may not substitute its judgment for that of the magistrate. . . . Similarly, this Court reviews the circuit court's decision de novo to determine whether the district court abused its discretion." *Id.*

The prosecution need not establish guilt beyond a reasonable doubt at the preliminary examination. *People v Fielder*, 194 Mich App 682, 693; 487 NW2d 831 (1992). "However, evidence regarding each element of the crime or evidence from which the elements may be inferred must exist. When the evidence conflicts or raises a reasonable doubt concerning guilt, there are questions for the trier of fact, and the defendant should be bound over." *People v Carlin (On Remand)*, 239 Mich App 49, 64; 607 NW2d 733 (2000).

Plaintiff first argues that the district court erred in not binding over defendant on the charge of CSC I.[1] We agree. The element of CSC I at issue here is whether defendant coerced complainant to submit to sexual penetration. Plaintiff's theory of the case was that complainant was coerced in that she was constrained by subjugation to submit. Plaintiff argues that defendant used his position of authority over complainant to train her that sexual relations were a normal and expected part of their relationship. Defendant's position of authority over complainant, plaintiff argues, was the result of her viewing defendant as a surrogate father, as well as because of his position as a deputy sheriff.

Resolution of this issue revolves around the question of what constitutes coercion for purposes of MCL 750.520b(1)(f). This particular situation is not included in the list of examples set forth in subsection 520b(1)(f)(i)-(v). However, the statute makes clear that this list is not all-inclusive. MCL 750.52b(1)(f) ("Force or coercion includes but is not limited to any of the following circumstances . . . ."). See also *People v Brown*, 197 Mich App 448, 450; 495 NW2d 812 (1992).

This Court has considered the question of what constitutes coercion for purposes of the CSC statutes before. Although none of these cases addressed this issue in terms of the CSC I statute, we find their reasoning persuasive.

In *People v Premo*, 213 Mich App 406; 540 NW2d 715 (1995), this Court considered what constituted coercion for purposes of fourth-degree criminal sexual conduct, MCL 750.520e(1)(a). The *Premo* Court defined coercion as follows: "Coercion 'may be actual, direct, or positive, as well as where physical force is used to compel act against one's will, or implied, legal, or constructive, as where one party is constrained by subjugation to other to do what his free will would refuse." *Premo, supra* at 410-411, quoting Blacks Law Dictionary (5th ed), 234.

This definition has been cited with approval by this Court in other CSC cases. See, e.g., *People v Knapp*, 244 Mich App 361, 370; 624 NW2d 227 (2001). The definition sets up two broad categories: (1) "actual, direct, or positive" coercion; and (2) "implied, legal or constructive" coercion. Each of these categories is followed by an example. For "actual, direct, or positive" coercion, the example given is "where physical force is used to compel act against one's will;" for "implied, legal or constructive" coercion, the example is "where one party is constrained by subjugation to other to do what his free will would refuse." These examples are not, however, exhaustive of the types of behavior that would constitute coercion under the two

[1] The prosecution has not raised or argued that the district court erred in dismissing the felony-firearm charge that was related to the CSC I charge. Accordingly, we consider that matter abandoned on appeal. *People v McMiller*, 202 Mich App 82, 83, n 1; 507 NW2d 812 (1993).

broad categories. In other words, while the use of physical force is one type of "actual, direct, or positive" coercion, it is not the only type of behavior that would fall into this category.

Similarly, the term subjugation is not shorthand for "implied, legal or constructive" coercion. Subjugate means "[t]o bring under control; conquer . . . [t]o make subservient; enslave." *The American Heritage Dictionary of the English Language* (3rd ed, 1996), p 1789. There are other means short of such behavior that can and do constitute "implied, legal or constructive" coercion for purposes of the CSC I statute. For example, in *Premo* this Court concluded that the defendant high school teacher's "actions constituted implied, legal, or constructive coercion because, as a teacher, defendant was in a *position of authority* over the student victims and the incidents occurred on school property." *Premo, supra* at 411 (emphasis added).

Exploitation of a position of authority was recently examined in depth by this Court in *Knapp*. In *Knapp*, the defendant taught a form of therapy called reiki. As adduced at trial, reiki "is an ancient healing art that involves 'energy centers' in the body . . . . Reiki practitioners use various hand positions to activate internal healing powers in their patients." *Id.* at 365. The *Knapp* Court found not that the defendant had subjugated complainant, but that the "defendant exploited and abused his position of authority to compel an extremely vulnerable youth to engage in sexual contact." *Id.* at 372. In affirming the defendant's conviction,[2] the *Knapp* Court further observed that "in a situation involving an authority figure, coercion can include 'subtle persuasion' or 'undue influence and psychological manipulation.'" *Id.* at 374, quoting *State v Collins*, 129 NH 488, 490; 529 A2d 945 (1987).

We also find the reasoning of the *Collins* case to be instructive. The statutes involved in *Collins* indicated that

> a person is guilty of a misdemeanor if he subjects another person to sexual contact where the victim is 13 years of age or older and under 15 years of age and the person is in a position of authority over the victim and uses this authority to coerce the victim to submit. [*Id.* at 489.]

The *Collins* court rejected the defendant's argument that under the applicable statutory language, coercion is limited to "undue influence or psychological domination." *Id.* "Although undue influence and psychological manipulation are often part of the relationship between the actor and the victim," the court observed, "they are not the sole coercive powers for which such an actor is accountable." *Id.* at 490.

These cases show that exploitation of a position of authority can be accomplished in a variety of ways. The continuum of such exploitation stretches, at least, from very "subtle persuasion" to more direct application of the "'power to require and receive submission [and] the right to expect obedience' from the victim." *State v Carter*, 140 NH 114, 117; 663 A2d 101 (1995), quoting *Webster's Third New International Dictionary* (unabridged ed, 1961), p 146. At

[2] The defendant in *Knapp* was convicted by a jury of second-degree criminal sexual conduct, MCL 750.520c(1)(b)(iii). The defendant was sentenced as a habitual offender, second-offense, MCL 769.10; and a sexual offender, second-offense, MCL 750.520f, to 60 to 270 months' imprisonment. *Knapp, supra* at 365.

some point, which we do not identify for purposes of this case, this later form of exploitation becomes a form of subjugation. It is this type of exploitation, i.e., subjugation through exploitation of a position of authority, that the prosecution argues occurred in the case at hand.

After reviewing the record, we conclude that enough evidence was presented at the preliminary hearing through which the element of coercion may be inferred. The prosecution established that the sexual relationship began when complainant was at a vulnerable age (aged 12). At first, the relationship between complainant and defendant was centered on the girl's participation in junior high school basketball. Defendant's wife was complainant's coach, and defendant was apparently actively involved in the team's activities. Then, complainant was asked to baby-sit for defendant's children. Eventually, complainant was spending time at defendant's home even when she was not baby-sitting. Sometimes, complainant would spend the night. Complainant testified about how she began to feel like a part of defendant's family, and how she looked on defendant as being the father that she did not have. The two would spend time together at a shooting range, defendant's family cabin, and complainant's home. We believe that this evidence is sufficient for the prosecution to argue to the trier of fact that defendant was in a position of authority over complainant.

We further conclude that sufficient evidence was presented for the prosecution to argue its theory of subjugation. The evidence establishes a gradual build up of involvement between complainant and defendant. At some point, defendant's behavior toward complainant became sexually suggestive; complainant testified that defendant would often touch her buttocks and direct sexually suggestive comments toward her. Next, while complainant was aged 12, their involvement came to include sexual intercourse, which according to complainant lasted until she was aged 18. Complainant testified that from the very first, sexual activity simply became "automatic" and "something that was expected." Regarding the sexual encounter at the heart of the present charge, complainant testified that while defendant had not physically forced her into the act, he "had manipulated [her] mind." She continued: "I feared – you have to understand I loved this person like a father figure and I was scared to say no to him."

Therefore, looking to the circumstances set forth at the preliminary hearing, *Brown, supra* at 450, [3] we hold that the district court abused its discretion in not binding over defendant on the charge of CSC I. The evidence presented at the preliminary hearing was sufficient to establish that CSC I had been committed and that there is probable cause to believe that defendant committed it. See *People v Crippen*, 242 Mich App 278, 282; 617 NW2d 760 (2000).

However, we disagree with the prosecution's argument that the circuit court erred in quashing the bindover for misconduct in office and the related felony-firearm charge. To prove a charge of misconduct in office, the prosecution must establish that "(1) the [offender] is a public

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[3] In *Brown, supra* at 450, a CSC I case, the Court observed that "coercion is not limited to physical violence but is instead determined in light of all the circumstances." The *Brown* Court rejected the defendant's argument that insufficient evidence of force or coercion had been adduced at his trial. *Id.* The defendant had sex with a woman who had been kidnapped by others. *Id.* He found the victim "sitting in a bedroom, alone, naked, and crying. He disregarded her requests to go home and her statements that she did not want to be there and did not want to have intercourse." *Id.*

officer, (2) the conduct must be in the exercise of the duties of the office or done under the color of the office, (3) the acts were malfeasance or misfeasance, and (4) the acts must be corrupt behavior." *People v Carlin* (*On Remand*), 239 Mich App 49, 64; 607 NW2d 733 (1999). The evidence in record does not establish that defendant is a public officer for purposes of the misconduct in office charge, because the complained of behavior did not relate in any way to his position as a deputy sheriff. *People v Coutu*, 459 Mich 348, 358; 589 NW2d 458 (1999). Further, the evidence presented does not establish that the behavior at issue occurred "in the exercise of the duties of the office or done under the color of the office." With no showing that the underlying felony was committed, the felony-firearm charge also fails.

We affirm the circuit court's dismissal of the charge of misconduct in office and the related felony-firearm charge. We direct that this case be remanded to the district court for reinstatement of the CSC I charge. Further proceedings are to be consistent with this opinion.

We do not retain jurisdiction.

/s/ Donald E. Holbrook, Jr.
/s/ Gary R. McDonald
/s/ Henry William Saad